

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

NICHOLAS V. MAESTAS,

Plaintiff,

3:13-cv-00301-RCJ-WGC

REPORT & RECOMMENDATION OF U.S. MAGISTRATE JUDGE

V.

STATE OF NEVADA, et. al.,

Defendants.

12 This Report and Recommendation is made to the Honorable Robert C. Jones, United
13 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to
14 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4. Before the court is
15 Plaintiff's Motion for Summary Judgment. (ECF No. 47.)¹ Defendants filed a response and
16 Cross-Motion for Summary Judgment. (ECF Nos. 49/50.) Plaintiff filed a response to
17 Defendants' cross-motion. (ECF No. 52.) Defendants filed a reply in support of their motion.
18 (ECF No. 55.)

19 After a thorough review, the court recommends that Plaintiff's motion be denied and
20 Defendants' cross-motion be granted.

I. BACKGROUND

22 At all relevant times, Plaintiff was an inmate in the custody of the Nevada Department of
23 Corrections (NDOC). (Pl.'s Am. Compl., ECF No. # 4.) He is a pro se litigant and brings this
24 action pursuant to 42 U.S.C. § 1983 concerning conduct that occurred while he was housed at
25 Lovelock Correctional Center (LCC). (*Id.*) Defendants are: Matt Wightman, Ramon Olivas and
26 Valaree Olivas. (*Id.*)

¹ Refers to court's electronic case filing (ECF) number.

1 In Count I, Plaintiff alleges that on May 10, 2011, Unit 3A was put on lockdown after
 2 two inmates were arrested for fighting. (ECF No. 5 at 4.) On May 17, 2011, Plaintiff thought it
 3 was unfair that he should be punished and placed on lockdown for the actions of other inmates.
 4 (*Id.*) He wrote a grievance to this effect and concerning previous threats by Wightman. (*Id.*) On
 5 July 28, 2011, Unit 3A was put on lockdown status again. (*Id.*) Plaintiff asserts that while touring
 6 the unit, Wightman answered questions being asked by the inmates, such as whether they would
 7 get showers. (*Id.*) Plaintiff then asked Wightman why he had to pay for someone else's actions,
 8 and advised him that he had a grievance against him. (*Id.*) Wightman opened Plaintiff's cell
 9 door. (*Id.*) Plaintiff said, "I have a grievance for you." (*Id.*) Wightman ordered Plaintiff to face
 10 the wall, which Plaintiff did. (*Id.*) Plaintiff again said, "I've got a grievance for you." (*Id.*)
 11 Wightman said: "That's it. You're done." Plaintiff alleges that Wightman then maliciously put
 12 handcuffs on Plaintiff and said: "He's going to 4A." (*Id.*) Unit 4A is the "hole." (*Id.*)

13 In Count II, Plaintiff alleges that after he was put in segregation, Wightman retaliated
 14 against Plaintiff for filing a grievance against him by writing a notice of charges against Plaintiff
 15 for inciting a riot. (*Id.* at 5.) Eventually the charge was dismissed. (*Id.*)

16 In Count III, Plaintiff alleges that on June 3, 2012, he was in protective custody in Unit
 17 3A with inmate Bell. (*Id.* at 6.) In that unit, there is no cell visiting, and Bell was not Plaintiff's
 18 cellmate. (*Id.*) Around dinner time, Bell began following Plaintiff around the unit and attempted
 19 to assault Plaintiff on the unit floor. (*Id.*) Plaintiff walked away with his hands over his head and
 20 went toward his cell. (*Id.*) Bell tried to rush into Plaintiff's cell, but was prevented by another
 21 inmate. (*Id.*) Plaintiff closed his cell door for thirty minutes, and came to the unit floor outside
 22 his cell where Bell was waiting behind a pillar to ambush him. (*Id.*) Plaintiff saw Bell and asked
 23 Bell to come out from behind the pillar and waived Bell toward his cell to find out what his issue
 24 was. (*Id.*) Plaintiff went to his cell and told Bell to remain at the doorway. (*Id.*) Bell entered his
 25 cell and attacked Plaintiff. (*Id.*) Bell then claimed to Ramon Olivas that Plaintiff had beaten him
 26 up. (*Id.* at 7.)

27 On June 4, 2012, Plaintiff claims that Ramon Olivas retaliated against Plaintiff on behalf
 28 of Valaree Olivas (whom Ramon Olivas is married to). (*Id.*) Plaintiff was in the process of suing

1 Valaree Olivas when Ramon Olivas filed the assault charge against Plaintiff regarding the
 2 incident with Bell despite the fact that there was video surveillance to prove Bell was the
 3 aggressor and Plaintiff's explanation that he acted in self-defense. (*Id.*) Plaintiff avers that
 4 Ramon Olivas did not charge Bell, and Bell was released to general population while Plaintiff
 5 was sent to lockdown in the hole for several months and was eventually charged \$300. (*Id.*)
 6 Plaintiff avers that Bell was put up to attacking Plaintiff by Ramon and Valaree Olivas to force
 7 Plaintiff into lockdown and pressure him to settle his lawsuit against Valaree Olivas. (*Id.*)

8 In Count IV, Plaintiff alleges that on June 6, 2012, Valaree Olivas, in concert with
 9 Ramon Olivas, retaliated against Plaintiff by keeping Plaintiff in administrative segregation
 10 lockdown because he was suing Valaree Olivas. (*Id.* at 8.) Plaintiff had no holds that would have
 11 kept him in lockdown, except for the "trumped up assault charge by Sgt. R. Olivas." (*Id.*) He
 12 notes again, that Bell was not placed in lockdown. (*Id.*)

13 In Count V, Plaintiff alleges that on July 6, 2012, Valaree Olivas, in concert with Ramon
 14 Olivas, retaliated against Plaintiff by keeping him in administrative segregation lockdown
 15 because Plaintiff was suing Valaree Olivas. (*Id.* at 10.) He avers that on June 21, 2012, his
 16 assault charge was reduced to G-6 (fighting), and he was given a thirty-day suspended sentence,
 17 and was told he would get out of lockdown. (*Id.*) Then, at the time Plaintiff was to be released
 18 from lockdown, Bell put Plaintiff on his "separatee" list, which prevented Plaintiff from being
 19 released from lockdown. (*Id.*) Plaintiff alleges that a staff member must have told Bell about
 20 Plaintiff being released, which caused Bell to put him on his "separatee" list. (*Id.*)

21 Plaintiff now moves for summary judgment as to Counts I and II. (ECF No. 47.)
 22 Defendants oppose Plaintiff's motion and have filed a cross-motion for summary judgment as to
 23 all counts. (ECF Nos. 49/50.)

24 **II. LEGAL STANDARD**

25 "The purpose of summary judgment is to avoid unnecessary trials when there is no
 26 dispute as to the facts before the court." *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18
 27 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted). In considering a motion for summary
 28 judgment, all reasonable inferences are drawn in favor of the non-moving party. *In re Slatkin*,

1 525 F.3d 805, 810 (9th Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255
 2 (1986)). "The court shall grant summary judgment if the movant shows that there is no genuine
 3 dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.
 4 Civ. P. 56(a). On the other hand, where reasonable minds could differ on the material facts at
 5 issue, summary judgment is not appropriate. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
 6 250 (1986).

7 A party asserting that a fact cannot be or is genuinely disputed must support the
 8 assertion by:

9 (A) citing to particular parts of materials in the record, including depositions,
 10 documents, electronically stored information, affidavits or declarations,
 11 stipulations (including those made for purposes of the motion only), admissions,
 12 interrogatory answers, or other materials; or
 13 (B) showing that the materials cited do not establish the absence or presence of a
 14 genuine dispute, or that an adverse party cannot produce admissible evidence to
 15 support the fact.

16 Fed. R. Civ. P. 56(c)(1)(A), (B).

17 If a party relies on an affidavit or declaration to support or oppose a motion, it "must be
 18 made on personal knowledge, set out facts that would be admissible in evidence, and show that
 19 the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

20 In evaluating whether or not summary judgment is appropriate, three steps are necessary:
 21 (1) determining whether a fact is material; (2) determining whether there is a genuine dispute as
 22 to a material fact; and (3) considering the evidence in light of the appropriate standard of proof.
 23 See *Anderson*, 477 U.S. at 248-250. As to materiality, only disputes over facts that might affect
 24 the outcome of the suit under the governing law will properly preclude the entry of summary
 25 judgment; factual disputes which are irrelevant or unnecessary will not be considered. *Id.* at 248.

26 In deciding a motion for summary judgment, the court applies a burden-shifting analysis.
 27 "When the party moving for summary judgment would bear the burden of proof at trial, 'it must
 28 come forward with evidence which would entitle it to a directed verdict if the evidence went
 uncontested at trial.'...In such a case, the moving party has the initial burden of establishing
 the absence of a genuine [dispute] of fact on each issue material to its case." *C.A.R. Transp.
 Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations
 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or

1 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate
 2 an essential element of the nonmoving party's case; or (2) by demonstrating the nonmoving party
 3 failed to make a showing sufficient to establish an element essential to that party's case on which
 4 that party will bear the burden of proof at trial. *See Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-
 5 25 (1986).

6 If the moving party satisfies its initial burden, the burden shifts to the opposing party to
 7 establish that a genuine dispute exists as to a material fact. *See Matsushita Elec. Indus. Co. v.*
 8 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a genuine dispute of
 9 material fact, the opposing party need not establish a genuine dispute of material fact
 10 conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a
 11 jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc.*
 12 *v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (quotation marks and citation
 13 omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the
 14 non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith*
 15 *Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). The nonmoving party cannot avoid
 16 summary judgment by relying solely on conclusory allegations that are unsupported by factual
 17 data. *Id.* Instead, the opposition must go beyond the assertions and allegations of the pleadings
 18 and set forth specific facts by producing competent evidence that shows a genuine dispute of
 19 material fact for trial. *Celotex*, 477 U.S. at 324.

20 That being said,

21 [i]f a party fails to properly support an assertion of fact or fails to properly address
 22 another party's assertion of fact as required by Rule 56(c), the court may: (1) give
 23 an opportunity to properly support or address the fact; (2) consider the fact
 24 undisputed for purposes of the motion; (3) grant summary judgment if the motion
 25 and supporting materials—including the facts considered undisputed—show that
 26 the movant is entitled to it; or (4) issue any other appropriate order.

27 Fed. R. Civ. P. 56(e).

28 At summary judgment, the court's function is not to weigh the evidence and determine
 29 the truth but to determine whether there is a genuine dispute of material fact for trial. *See*
Anderson, 477 U.S. at 249. While the evidence of the nonmovant is "to be believed, and all
 30 justifiable inferences are to be drawn in its favor," if the evidence of the nonmoving party is

1 merely colorable or is not significantly probative, summary judgment may be granted. *Id.* at 249-
 2 50 (citations omitted).

3 **III. DISCUSSION**

4 **A. Retaliation Standard**

5 All of Plaintiff's counts allege retaliation. The standard for establishing retaliation is set
 6 forth at the outset:

7 "Section 1983 provides a cause of action for prison inmates whose constitutionally
 8 protected activity has resulted in retaliatory action by prison officials." *Jones v. Williams*, 791
 9 F.3d 1023, 1035 (9th Cir. 2015); *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). Such a
 10 claim consists of five elements:

11 (1) An assertion that a state actor took some adverse action against an inmate (2)
 12 because of (3) that prisoner's protected conduct, and that such action (4) chilled
 13 the inmate's exercise of his First Amendment rights, and (5) the action did not
 14 reasonably advance a legitimate correctional goal.

15 *Jones*, 791 F.3d at 1035 (quoting *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005))

16 "The First Amendment guarantees a prisoner a right to seek redress of grievances from
 17 prison authorities as well as a right of meaningful access to the courts." *Id.* (citing *Bradley v.*
 18 *Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995)).

19 An inmate must submit evidence, either direct or circumstantial, to establish a link
 20 between the exercise of constitutional rights and the allegedly retaliatory action. *Pratt*, 65 F.3d at
 21 806-07. "[A] plaintiff must show that his protected conduct was the 'substantial' or 'motivating'
 22 factor behind the defendant's conduct." *Brodheim*, 584 F.3d at 1271 (internal quotation marks
 23 omitted, quoting *Soriano's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989)). Timing
 24 of the events surrounding the alleged retaliatory action may constitute circumstantial evidence of
 25 retaliatory intent. *See Soriano's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1316 (9th Cir. 1989). A
 26 plaintiff's mere speculation that there is a causal connection is not enough to raise a genuine
 27 issue of material fact. *See Nelson v. Pima Community College*, 83 F.3d 1075, 1081-82 (9th Cir.
 28 1996) ("mere allegation and speculation do not create a factual dispute for purposes of summary
 judgment") (citation omitted).

1 **B. Counts I and II**

2 Plaintiff moves for summary judgment as to Counts I and II. Defendants' have filed a
 3 cross-motion for summary judgment as to these counts, as well as the remaining counts. In Count
 4 I, Plaintiff alleges that Wightman retaliated against him by placing Plaintiff in the "hole" for
 5 filing grievances against Wightman. In Count II, Plaintiff alleges that Wightman retaliated
 6 against Plaintiff again for filing grievances against him by writing a notice of charges against
 7 Plaintiff for inciting a riot that was eventually dismissed.

8 Plaintiff contends that he filed a grievance against Wightman on May 17, 2011, for
 9 punishing him for the actions of other inmates. (ECF No. 47 at 3; Ex. C, ECF No. 47 at 20-34.)
 10 Then, on July 28, 2011, Plaintiff's unit was on lockdown again and all inmates were confined to
 11 their cells. (ECF No. 47 at 3; Ex. D, ECF No. 47 at 38; Pl.'s Decl., ECF No. 52/53 at 31.)
 12 Plaintiff asserts that during the lockdown, Plaintiff was complaining to Wightman through his
 13 cell door that he was being punished for the actions of another inmate. (ECF No. 47 at 3; Pl.'s
 14 Decl., ECF No. 52/53 at 31.) Wightman opened Plaintiff's cell door, and Plaintiff said: "I've got
 15 a grievance for you." (*Id.*) Wightman said, "get on the wall." (*Id.*) Plaintiff got on the wall, and
 16 said again, "I've got a grievance for you." (*Id.*) Wightman then yelled, "that's it, you're done."
 17 (*Id.*) He put Plaintiff in handcuffs and yelled, "he's going to 4A," which is the "hole." (*Id.*)
 18 Wightman took Plaintiff to administrative segregation and charged Plaintiff for inciting a riot
 19 because Plaintiff had complained about being punished for the actions of another inmate. (ECF
 20 No. 47 at 3; Ex. A, ECF No. 47 at 8-12.)

21 Defendants argue that there is no evidence that restraining Plaintiff and filing the notice
 22 of charges were done as a result of Plaintiff stating he had a grievance for Wightman. (ECF Nos.
 23 49/50 at 8.) They assert that Plaintiff's claim that this is the case is entirely speculative. (*Id.*)

24 According to Defendants, on July 28, 2011, Plaintiff was housed in Unit 3A at LCC, and
 25 after threats against NDOC staff were made in the unit, the officers decided to conduct an
 26 administrative search of the entire unit. (ECF Nos. 49/50 at 2; ECF No. 49-2; Wightman Decl.,
 27 ECF No. 49-2 ¶ 3.) While officers were conducting the search, Plaintiff asked Wightman why
 28 the entire unit was being held responsible for the actions of one inmate. (ECF Nos. 49/50 at 2,

1 Wightman Decl., ECF No. 49-2 ¶ 4.) He claimed the officers could not lockdown the entire unit
 2 on this basis. (*Id.*) During the interaction, Plaintiff continued to raise his voice, quoting NDOC
 3 Administrative Regulations (ARs) and legal terms. (*Id.*) Wightman was under the belief Plaintiff
 4 was attempting to gather support from other inmates on the tier to rebel against staff. (*Id.*)

5 Wightman recognized the seriousness of the unit search and volatility on the tier during
 6 the search. (ECF Nos. 49/50 at 2; Wightman Decl., ECF No. 49-2 ¶ 5.) Wightman believed
 7 Plaintiff's behavior was a threat to security and that Plaintiff was attempting to incite others to
 8 rebel. (*Id.*) As a result, Wightman restrained Plaintiff and placed him in Unit 4A (administrative
 9 segregation) pending a disciplinary hearing and for the safety and security of the unit. (ECF Nos.
 10 49/50 at 2; Wightman Decl., ECF No. 49-2 ¶ 6.) Wightman issued a notice of charges for
 11 inciting a riot against Plaintiff, along with a report. (*Id.*; Ex C, ECF No. 49-3.)

12 On September 1, 2011, a disciplinary hearing was held. (ECF Nos. 49/50 at 3; Ex. E,
 13 ECF No. 49-5.) The officer found Wightman's statement to be an accurate account of events;
 14 however, the facts did not fulfill the elements of inciting a riot under the ARs, and Plaintiff was
 15 found not guilty. (*Id.*)

16 Plaintiff asserts that the fact that the prison was on lockdown with each of the inmates in
 17 their cells refutes Wightman's claim that he had a legitimate penological interest in restraining
 18 Plaintiff and placing him in segregation. (ECF Nos. 52/53 at 4.)

19 Defendants contend that Plaintiff merely speculates that Wightman took these actions
 20 because of grievances filed and a potential future grievance Plaintiff might file, but has not
 21 presented evidence to rebut that Wightman took his actions because of Plaintiff's behavior in the
 22 unit at the time. (ECF No. 54 at 3.) They point out that Plaintiff does not dispute that he raised
 23 his voice, and quoted ARs and utilized legal terms, which caused Wightman to believe Plaintiff
 24 was attempting to garner support of other inmates on the tier to rebel against staff. (*Id.* at 4.)

25 In response to Plaintiff's motion and in support of their cross-motion, Defendants focus
 26 on the legitimate penological interest element of Plaintiff's retaliation claims. They provide the
 27 declaration of defendant Wightman, who says that the reason he restrained Plaintiff, took him to
 28 administrative segregation and issued a notice of charges was because Plaintiff's behavior,

1 coupled with the volatility present on the tier at that time presented a safety and security risk.
2 The unit was on lockdown because threats had been made against correctional staff. Plaintiff
3 does not dispute Wightman's description of his behavior.

4 Plaintiff's response to the asserted legitimate penological interest advanced by
5 Wightman's is that the unit was on lockdown with all inmates in their cells, implying there was
6 no safety and security risk. This fact that inmates are in their cells does not negate a risk of
7 increasing tensions in an already volatile situation. As a result, the court does not find Plaintiff
8 has raised a genuine dispute of material fact as to the legitimate penological interest element of
9 Plaintiff's claim. Plaintiff presents no other evidence that Wightman's conduct was not taken to
10 advance a legitimate penological interest.

11 As a result, the court recommends that Plaintiff's motion for summary judgment be
12 denied, and that Defendants' cross-motion for summary judgment be granted as to Counts I and
13 II.

14 **C. Counts III, IV, V**

15 **1. Count III**

16 In Count III, Plaintiff alleges that on June 3, 2012, inmate Bell began following Plaintiff
17 in an attempt to assault Plaintiff. There was eventually a confrontation between Plaintiff and
18 Bell, where Plaintiff claims Bell attacked him, but Bell told Ramon Olivas Plaintiff was the
19 aggressor. On June 4, 2012, Plaintiff contends that Ramon Olivas retaliated against Plaintiff on
20 behalf of his wife, Valaree Olivas, whom Plaintiff was suing. Plaintiff claims that Ramon Olivas
21 filed an assault charge against Plaintiff even though video surveillance would prove Bell was the
22 aggressor. Bell was not charged, and Plaintiff was charged, found guilty, and sent to lockdown
23 for several months.

24 Defendants acknowledge that Ramon Olivas and Valaree Olivas are married, and that
25 Plaintiff had previously sued Valaree Olivas and R. Olivas knew of the other unrelated litigation.
26 (ECF Nos. 49/50 at 11.)

27 Defendants contend that on June 4, 2012, another inmate (Bell) informed an infirmary
28 officer that he needed to speak to the sergeant or lieutenant on duty, and Ramon Olivas spoke to

1 Bell. (ECF Nos. 49/50 at 3; R. Olivas Decl., ECF No. 49-6 ¶ 4.) Bell informed Ramon Olivas
 2 that he had not fallen and injured himself as he previously reported, but he had been called over
 3 by the inmate who lived in cell 34 to talk, and upon entering the cell was attacked. (*Id.*) Ramon
 4 Olivas reviewed surveillance footage for the relevant time period and it clearly showed an inmate
 5 gesturing to another inmate on the tier with his hands. (ECF Nos. 49/50 at 3; R. Olivas Decl.,
 6 ECF No. 49-6 ¶ 5.) Ramon Olivas did not recognize the inmates involved, and asked another
 7 officer to identify the inmates. (*Id.*) The officer identified Plaintiff as the inmate making the hand
 8 gestures to the other inmate. (*Id.*) When Ramon Olivas interviewed Plaintiff, he asked what the
 9 fight was about. (ECF Nos. 49/50 at 3; R. Olivas Decl., ECF NO. 49-6 ¶ 6.) At first, Plaintiff was
 10 not cooperative and denied involvement in a fight. (*Id.*) Ramon Olivas informed Plaintiff he had
 11 heard the other inmate's story, and asked Plaintiff for his explanation. (*Id.*) Plaintiff simply
 12 stated that he had to defend himself. (*Id.*) Plaintiff had no visible injuries. (*Id.*)

13 Ramon Olivas believed Plaintiff had assaulted the other inmate based on the other
 14 inmate's statements and injuries, and the video footage. (ECF Nos. 49/50 at 4; R. Olivas Decl.,
 15 ECF No. 49-6 ¶ 7.) Plaintiff was informed he would be placed in administrative segregation
 16 pending a notice of charges for assault. (*Id.*) At his June 21, 2012 disciplinary hearing, Plaintiff
 17 pled guilty to the charge of fighting, and was given a suspended sentence. (ECF Nos. 49/50 at 4;
 18 Ex. G, ECF No. 49-8.)

19 In his opposition to Defendants' cross-motion, Plaintiff states that he disputes the
 20 contents of the video surveillance. (ECF Nos. 52/53 at 2.) He maintains that the video
 21 surveillance shows Plaintiff putting his hand up in a stopping gesture as Bell charged Plaintiff
 22 into his own cell. (*Id.*) He also disputes that he denied a fight occurred. (*Id.*) Plaintiff contends
 23 that because Plaintiff claimed self-defense, both Plaintiff and Bell should have been charged.
 24 (ECF Nos. 52/53 at 5.)

25 Plaintiff's claim about the video surveillance is contradicted by his own allegations in his
 26 complaint, where he specifically states: "Maestas saw Bell was waiting to ambush him and
 27 *requested Bell come from behind the pillar and waived Bell to his cell to find out Bell's issue.*"
 28

1 (ECF No. 5 at 6, emphasis added.) The court has viewed the video, and also interprets Plaintiff's
 2 hand gesture as clearly motioning for Bell to come into his cell. (Defs.' Ex. M, filed manually.)

3 Regardless of the parties' interpretation of the video evidence, there is no evidence in the
 4 record that Ramon Olivas wrote the notice of charges and had Plaintiff placed in administrative
 5 segregation because of the litigation involving his wife, Valaree Olivas. That is entirely
 6 speculative on Plaintiff's part. Instead, the evidence in the record demonstrates that Bell reported
 7 to Ramon Olivas that his injuries were a result of Plaintiff's actions. Ramon Olivas observed
 8 Bell's injuries. Ramon Olivas then reviewed the video footage, which he interpreted as showing
 9 Plaintiff motioning for Bell to come toward his cell. Ramon Olivas interviewed Plaintiff about
 10 the incident, and Plaintiff's only explanation was self-defense. Ramon Olivas observed that
 11 Plaintiff had no injuries. On the basis of his interview with Bell, Bell's injuries, and his interview
 12 with Plaintiff, Ramon Olivas determined Plaintiff was the aggressor and wrote the notice of
 13 charges, and Plaintiff was placed in segregation. There is absolutely no discernible connection
 14 between this series of events and the separate litigation Plaintiff was pursuing against Valaree
 15 Olivas. The fact that Bell was not also charged with fighting lends no support to Plaintiff's claim
 16 that Plaintiff being placed in segregation and issued a notice of charges is related to the litigation
 17 against Valaree Olivas.

18 As a result, the court recommends that summary judgment be granted in Defendants'
 19 favor as to Count III.

20 **2. Counts IV and V**

21 In Count IV, Plaintiff alleges that on June 6, 2012, Valaree Olivas, in concert with
 22 Ramon Olivas, retaliated against Plaintiff by keeping Plaintiff in administrative segregation
 23 lockdown because he was suing Valaree Olivas. In Count V, Plaintiff alleges that on July 6,
 24 2012, Valaree Olivas, in concert with Ramon Olivas, retaliated against Plaintiff by keeping him
 25 in administrative segregation lockdown because he was suing Valaree Olivas. (*Id.* at 10.) He
 26 avers that on June 21, 2012, his assault charge was reduced to G-6 (fighting), and he was given a
 27 thirty-day suspended sentence, and was told he would get out of lockdown. (*Id.*) Then, at the
 28 time Plaintiff was to be released from lockdown, Bell put Plaintiff on his "separatee" list, which

1 prevented Plaintiff from being released from lockdown. (*Id.*) Plaintiff alleges that a staff member
 2 must have told Bell about Plaintiff being released, which caused Bell to put him on his
 3 “separatee” list. (*Id.*)

4 According to Defendants, Plaintiff was placed in administrative segregation while the
 5 investigation regarding the altercation, Plaintiff’s safety, the other inmates’ safety and the
 6 institution’s safety could be completed. (ECF Nos. 49/50 at 13.) On June 22, 2012, Caseworker
 7 Belanger updated Plaintiff’s case notes regarding his June 21, 2012 disciplinary hearing. (ECF
 8 Nos. 49/50 at 4; Ex. H, ECF No. 49-8 at 12.) The notes entered at 2:00 p.m. reflect that Plaintiff
 9 was found guilty of a G6 charge, and his sanction was suspended and he could return to the
 10 protective segregation yard at LCC. (*Id.*) Caseworker Belanger updated the notes at 2:45,
 11 indicating that the caseworker directed officers to speak with inmate Bell. (*Id.*) The notes reflect
 12 that Plaintiff would not be able to move back to Unit 3A based on inmate Bell’s statements that
 13 he was not comfortable having Plaintiff back in his unit and wanted to add Plaintiff as a
 14 “separatee.” (*Id.*) A “separatee” is defined in AR 522 as inmates that need to be separated from
 15 other inmates due to enemy relationships or other special reasons. (ECF Nos. 49/50 at n. 4.)
 16 Inmate Bell requested to have Plaintiff listed as a “separatee” because he was afraid of Plaintiff.
 17 (ECF Nos. 49/50 at 4; Ex. I, ECF No. 49-9.) On July 6, 2012, Plaintiff was informed he would
 18 not return to unit 3A and would remain in administrative segregation until appropriate housing
 19 was available. (ECF Nos. 49/50 at 5; ECF No. 5 at 11.)

20 Defendants assert that there is no evidence to establish that the litigation against Valaree
 21 Olivas had anything to do with this notice of charges or Plaintiff’s placement in administrative
 22 segregation, and Plaintiff’s contention that this is the case is purely speculative. (ECF Nos. 49/50
 23 at 11.)

24 Defendants state that regardless of Plaintiff’s allegations that there was additional
 25 surveillance footage that would establish a pattern of Bell stalking Plaintiff, Ramon Olivas based
 26 his decision to file the notice of charges on the video footage he reviewed, Bell’s injuries and
 27 statement. (ECF Nos. 49/50 at 12.)

28

1 The court finds that there is no evidence in the record demonstrating that Plaintiff was
2 kept in administrative segregation following the incident with inmate Bell because of the
3 litigation Plaintiff was pursuing against Valaree Olivas. Plaintiff was initially placed in
4 administrative segregation pending the investigation and notice of charges regarding the incident.
5 After the hearing, his caseworker initially determined he would be placed back in protective
6 segregation. Within an hour of that determination, the caseworker noted that officers had spoken
7 to Bell, who wanted to list Plaintiff as a “separatee,” which would preclude Plaintiff from
8 returning to that unit. There is no evidence that either Ramon or Valaree Olivas had anything to
9 do with Bell’s decision to list Plaintiff as a “separatee.” Plaintiff was advised he would remain in
10 administrative segregation while his housing assignment could be determined.

11 With no evidence linking Plaintiff's housing status with Plaintiff's litigation against
12 Valaree Olivas, the court recommends that summary judgment be granted in Defendants' favor
13 as to Counts IV and V.

IV. RECOMMENDATION

15 **IT IS HEREBY RECOMMENDED** that the District Judge enter an order **DENYING**
16 Plaintiff's Motion for Summary Judgment (ECF No. 47), and **GRANTING** Defendants' Cross-
17 Motion for Summary Judgment (ECF No. 50).

18 The parties should be aware of the following:

19 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
20 this Report and Recommendation within fourteen days of receipt. These objections should be
21 titled "Objections to Magistrate Judge's Report and Recommendation" and should be
22 accompanied by points and authorities for consideration by the district judge.

23 2. That this Report and Recommendation is not an appealable order and that any notice of
24 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed
25 until entry of judgment by the district court.

27 | DATED: December 8, 2015.

William G. Cobb
WILLIAM G. COBB
UNITED STATES MAGISTRATE JUDGE